

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM ROBERT BURDICK and)	
EDNA BURDICK,)	
)	
Plaintiff,)	
)	
v.)	
)	CIVIL ACTION NO. 05-119E
)	JUDGE COHILL
)	Electronically Filed
UNITED STATES OF AMERICA,)	
)	
)	
Defendant.)	

ANSWER OF DEFENDANT TO COMPLAINT

AND NOW, comes the Defendant, the United States of America, by and through its attorneys, Mary Beth Buchanan, United States Attorney for the Western District of Pennsylvania, and Jessica Lieber Smolar, Assistant United States Attorney for said district, and file the following Answer to Plaintiffs' Complaint:

FIRST AFFIRMATIVE DEFENSE

JURISDICTION

1. Paragraph 1 of Plaintiffs' Complaint contains jurisdictional allegations to which no response is required. To the extent that this paragraph is deemed to state factual averments, such averments are specifically denied.

2. Paragraph 2 of Plaintiffs' Complaint contains jurisdictional allegations to which no response is required. To the

extent that this paragraph is deemed to state factual averments, such averments are specifically denied.

PARTIES

3. Defendant admits the averments set forth in Paragraph 3 of Plaintiff's Complaint upon information and belief.

4. Defendant admits the averments set forth in Paragraph 4 of Plaintiff's Complaint upon information and belief.

5. Defendant admits the averments set forth in Paragraph 5 of Plaintiff's Complaint upon information and belief.

6. Defendant admits the averments set forth in paragraph 6 of Plaintiff's Complaint.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

7. Defendant admits the averments set forth in paragraph 7 of Plaintiff's Complaint.

8. Defendant admits the averments set forth in paragraph 8 of Plaintiff's Complaint.

FIRST CLAIM FOR RELIEF

9. Defendant admits only that Plaintiff William Robert Burdick was seen by the surgical service on three occasions at the Erie VAMC from June 18, 2002 through July 29, 2002. Defendant also admits that Plaintiff had previously undergone treatment at the Erie VAMC. The remaining allegations set forth in Paragraph 9 of Plaintiff's Complaint contain conclusions of law to which no response is required. To the extent that this paragraph is deemed to state factual averments, such averments are specifically denied.

10. Defendant admits the averments set forth in paragraph 10 of Plaintiffs' Complaint.

11. Paragraph 11 of Plaintiffs' Complaint contains conclusions of law to which no response is required. To the extent that this paragraph is deemed to state factual averments, such averments are specifically denied.

12. Defendant denies the averments set forth in paragraph 12 of Plaintiffs' Complaint.

13. Defendant denies the averments set forth in paragraph 13 of Plaintiffs' Complaint.

14. Defendant denies the averments set forth in paragraph 14 of Plaintiffs' Complaint.

15. Defendant denies the averments set forth in paragraph 15 of Plaintiffs' Complaint.

SECOND CLAIM FOR RELIEF

16. The answers to paragraphs 1 through 15 are incorporated herein by reference as if set forth fully herein.

17. Defendant denies the averments set forth in paragraph 15 of Plaintiffs' Complaint.

THIRD CLAIM FOR RELIEF

18. The answers to paragraphs 1 through 17 are incorporated herein by reference as if set forth fully herein.

19. The answers to paragraphs 1 through 18 are incorporated herein by reference as if set forth fully herein.

Defendant admits that Edna Burdick is the wife of William Robert Burdick upon information and belief.

20. Defendant denies the averments set forth in paragraph 20 of Plaintiffs' Complaint.

The unnumbered paragraph following paragraph 20 of Plaintiffs' Complaint contains Plaintiffs' prayer for relief and as such requires no response. To the extent a response is required, those averments are specifically denied.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a claim upon which the relief can be granted.

THIRD AFFIRMATIVE DEFENSE

This Court lacks subject matter jurisdiction.

FOURTH AFFIRMATIVE DEFENSE

The alleged injuries and damages of Plaintiffs were not proximately caused by a negligent, careless or wrongful act or omission of the Defendant.

FIFTH AFFIRMATIVE DEFENSE

Defendant did not breach a cognizable duty owed to Plaintiffs.

SIXTH AFFIRMATIVE DEFENSE

Pursuant to 28 U.S.C. § 2675(b), Plaintiffs are prohibited from seeking an amount over the amount asserted in their administrative claim.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff William Robert Burdick's own negligence is the sole and/or contributory cause of the occurrence set forth in the Complaint. Plaintiff is therefore barred from recovery.

EIGHTH AFFIRMATIVE DEFENSE

The concurrent acts of others, and not of the Defendant, were the proximate cause of the occurrence set forth in Plaintiffs' Complaint. Plaintiffs are therefore barred from recovery.

NINTH AFFIRMATIVE DEFENSE

The acts of others, and not Defendant, were the sole and proximate intervening and/or superseding cause of the occurrence set forth in Plaintiffs' Complaint. Plaintiffs are therefore barred from recovery.

TENTH AFFIRMATIVE DEFENSE

Plaintiffs' damages are limited to the damages recoverable under the Federal Tort Claims Act, 28 U.S.C. § 1346 (b), 2671 et seq. Attorney's fees are taken out of any judgment or settlement and are governed by the statute. 28 U.S.C. § 2678.

WHEREFORE, Defendant, the United States of America, respectfully requests that Plaintiffs' Complaint be dismissed with prejudice, that judgment be entered in favor of Defendant, that Defendant be awarded attorneys' fees, and disbursements, and such other and further relief as the Court deems appropriate in this action.

Respectfully submitted,

MARY BETH BUCHANAN
United States Attorney

s/Jessica Lieber Smolar
JESSICA LIEBER SMOLAR
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Answer was electronically filed and/or duly served this 25th day of July, 2005, by first-class mail, to and upon the following:

Christina S. Nacopoulos, Esq.
1001 State Street, Suite 1400
Erie, PA 16501

s/Jessica Lieber Smolar
JESSICA LIEBER SMOLAR
Assistant U.S. Attorney